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NO._____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

THOMAS J. DONAGHY, Petitioner

vs.

The CITY OF OMAHA, a municipal corporation, JAMES SKINNER, Chief of Police, and P.J. MORGAN, Mayor of Omaha,

Defendants

Petition For Writ Of Certiorari To The Court Of Appeals Of The United States For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does Martin v. Wilks mean as it says that "unless duly summoned, a person not privy may rest assured that a judgment recovered therein will not affect his legal rights." ?

2. Can an otherwise discriminatory employment promotion decision be justified by the actor claiming to be attempting to comply with a consent decree even though that decree clearly does not require the complained of action?

3. Does the fact that some unnamed and unknown White person in the past may, by reason of past racial discrimination in which the present applicant in no way participated, have received preference over some unidentified minority person with higher qualifications justify discriminating against the present better qualified applicant upon the basis of race ?

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Decision violates United States Constitution Thirteenth and Fourteenth Amendments, 42 United States Code s 1981 and 1983.

Decision is contrary to the following decisions of the United States Court of Appeals for the Eighth Circuit and The Supreme Court of the United States.

Carter v. Gallagher, 452 F 2d 315, (8th Cir. 1971);

City of Richmond v. J.A. Croson, Co., 109 S. Ct. 706 (1989);

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NO._____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

THOMAS J. DONAGHY, Petitioner

vs.

The CITY OF OMAHA, a municipal corporation, JAMES SKINNER, Chief of Police, and P.J. MORGAN, Mayor of Omaha.

Defendants

Petition For Writ Of Certiorari To The Court Of Appeals Of The United States For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, Thomas J. Donaghy, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of the United States for the Eighth Circuit,

filed August 7, 1991, denying Petitioner's suggestion for hearing en banc and petioner's petition for rehearing thereby letting stand the Judgment of the Eighth Circuit entered May 24, 1991 afirming the judgment of the United States District Court for Nebraska (amended) filed April 11, 1990.

OPINIONS BELOW

The Opinions of The United States District Court for Nebraska, United States Court of Appeals for the Eighth Circuit and United States Court of Appeals denial of rehearing are reproduced in the Appendix hereto at A-1 through A-76.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 USC s 1254 (1) on the ground that the United States

District Court below, whose jurisdiction was conferred by 28 USC s 1331, 1343, 2201 and 2202, refused to enforce the 13th ammendment and 14th ammendment of the United States, 42 USC 1981 & 1983 to protect the Petitioner from race discrimination and denial of due process. The United States District Court decision was filed April 11, 1990, The Eighth Circuit Court of Appeals entered May 24, 1991, and the Eighth Circuit denied rehearing August 7, 1991.

ORDINANCES, STATUTES, AND CONSTITUTIONAL AUTHORITIES INVOLVED

42 United States Codes s 1981 and 1983, United States Constitution, Thirteenth and Fourteenth Amendments, Ordinances of the City of Omaha Sec. 23-231 and 23-232. See Appendix at A-99 through A-106 for verbatim statement of these authorities.

STATEMENT OF THE CASE

The facts establish that the Petitioner, Thomas J. Donaghy, is and was at the relevant times a member of the Omaha, Nebraska Police Department. In 1981 or 1982 he applied for the position of Sergeant and took the test.(Tr 12, A 77) He was required to take a retest because of a complaint by some of the minoritiy members of the police department who felt that the testing process was unfair. Donaghy was not notified and took no part, Consent Decree herein resulted, the process was modified.(Tr 13 l 12-18, A-77) Officer Donaghy was promoted to Sergeant and in 1987 applied for promotion to Lieutenant(Tr. 15 l 3-7,(A 77 & 78) and went through testing in April of 1988. In that process all candidates were tested in three separate test sections.(E 102, A 97) In each section the candidates were listed in rank

order to be selected for advancement to the next section. If there were not enough black candidates chosen in this manner some white candidates were removed from the list and replaced by black candidates who had scored lower. This was done in each section and Sgt. Anthony Hadley was one of the lower scoring candidates who was advanced because of his race. (Tr. 85 1 3-8, A 78)

When it came time to forward names for advancement to the Chief for consideration for promotion the candidates were referred at the first list in order of rank number one through 5 and Sergeant Hadley (who should not have gotten this far in the process based on his test scores) who was number 15 was also referred with a note on the list indicating that a black candidate must be promoted. (E 103, A-98)

Sergeant Donaghy was number

seven on the list and would not have been referred at this point but the list was a two year list and as time developed Sergeant Donaghy would have been referred by the time the expired and could have been promoted had Hadley not been improperly advanced in both the testing and referral process. (Tr 134 l 25& 135 l 1-4 A-79 & 80).

REASONS FOR GRANTING THE WRIT

Decision violates United States Constitution Thirteenth and Fourteenth Amendments, 42 United States Code s 1981 and 1983.

Decision is contrary to the following decisions of the United States Court of Appeals for the Eighth Circuit and The Supreme Court of the United States.

Carter v. Gallagher, 452 F 2d 315, (8th Cir. 1971);
City of Richmond v. J.A. Croson, Co., 109 S. Ct. 706 (1989);
Martin v. Wilks, 109 S. Ct 2180 (1989).

1. Does Martin v. Wilks mean as it says that "unless duly summoned, a person not privy may rest assured that a judgment recovered therein will not affect his legal rights."

In the Eighth Circuit Appeal decision in this matter The Court said" Wilks simply holds that those who did not participate and were not represented in prior consent decree litigation may have the opportunity to 'ask a court to consider their claims that actions taken pursuant to the consent decree are unlawful under the governing statutory and constitutional standards.' Selig, Affirmative Action in Employment After Croson and Martin: The Legacy Remains Intact, 63 Temple L. Rev. 1, 21, (1990)." Law review articles are not the first source we go to in deciding the meaning of a Court decision. We would prefer to

go to the words of the decision and previous decisions. In this instance one only need read the words and cites of Wilks to see what the holding is. In Martin v. Wilks, 109 S.Ct 2180 (1989), the Court said, "No one can seriously contend that an employer might successfully defend against a Title VII claim by one group of employees on the ground that its actions were required by an earlier decree entered in a suit suit brought against it by another, if the later group did not have adequate notice or knowledge of the earlier suit." Wilks, 2187. The Court clearly was indicating that a Consent Decree like the one herein could not be used against a person in the position of the Plaintiff who was not a party to that lawsuit. Sergeant Donaghy clearly indicated that he was not a party to nor did he participate in the lawsuit resulting in the Consent Decree. (TR p.

224, Appendix p. 81) The Court herein, in the appeal decision, said "Donaghy's Union did not ask to intervene" (A-5) Wilks, however, said as follows:

"Joinder, as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the Court and bound by judgment or decree."

Also, "A person not a privy may rest assured that a judgment recovered therein will not affect his legal rights." "A party seeking a judgment binding on another cannot obligate the person to intervene; he must join him." And again, "A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings." Although it recognized a strong public policy in favor of

voluntary affirmative action plans, the panel acknowledged that this interest "must yield to the policy against requiring third parties to submit to bargains in which their interests were either ignored or sacrificed." Martin v. Wilks, Supra 2185. There the Court said clearly that" a person cannot be deprived of his legal rights in a proceeding to which he is not a party." Martin v Wilks 109 S.Ct. 2180 (1989) at 2183. It seems clear that Wilks was misinterpreted by the Eighth Circuit Court.

2. Can an otherwise discriminatory employment promotion decision be justified by the actor claiming to be attempting to comply with a consent decree even though that decree clearly does not require the complained of action?

The Appeal Court below indicated that the black candidate promoted was qualified and that the consent decree was valid and therefore could be used by the City as a justification to make race conscious employment decisions. (A 60 fn 14) Donaghy contended that even if Wilks does not preclude using the consent decree as a defense, the fact that the consent decree does not require the complained of action does. The jury below could well have used this fact as a basis for rejecting the city's claim that it was following the consent decree in its actions. We are sure that it is well known to the court that what the intent of the city was is a question of fact, that questions of fact are to be determined by a jury or if a verdict is directed there can be no credible evidence supporting the party against

whom the verdict is directed on the point in question. The court in the appeal herein went to great trouble to show that the consent decree herein was valid but did not discuss the requirements of the decree. The Sixth circuit suggested "The scope of a consent decree must be determined within its four corners" Firefighters v. Stott, 467 U.S. 561 (1984) at 562. The Consent Decree herein included the following paragraph:

"Nothing herein shall be interpreted as requiring the City to hire unnecessary personnel, or to hire, transfer, or promote a person who cannot qualify on the basis of objective job-related criteria, or to hire, transfer or promote a person who is less qualified on the basis of properly validated employment selection devices within the meaning of the Uniform Guidelines on Employee Selection Procedures" (Consent Decree p.

4 & 5 - A 81 through 85) The city tries to argue that the testing used by the city is not properly validated within the meaning of the guidelines, however, Mr. Mendenhall in response to a question by Mr. Earnshaw

Q. Okay. Can you tell me how you determine whether a test is valid for selecting people for promotion; for example, in this position, lieutenant, how do you determine whether a test is valid?

A. Well, according to federal guidelines, there are three methods to determine that a test is valid. Those methods are called criteria and related validity, construct validity, and content validity. The method that we use in the personnel department for almost all positions, including the promotional positions in the police department, is what is called content validity. (TR. p.

47, 9-21, Appendix p. 85). After quoting to him the above paragraph from the Consent Decree Mr. Earnshaw asked Mr. Mendenhall Q. And without getting into a lot of detail about it you do consider the Uniform Guidelines that are referred to here in your validation of the test results, do you not? A. Yes, we do.(TR. p 90, 7-21 A 85 through 86) It was clearly established in the testimony below that candidate Sgt. Hadley was advanced in the testing procedure when he was not qualified to go on. There was a cut after in-basket testing where the number was reduced from 34 participants to 20. When the cut was reviewed by rank order, which the city used as a measure of qualifications, Hadley did not qualify as he was ranked lower than 20. The city then removed more qualified by rank white candidates and replaced them with Hadley solely because of his race. Even if the

candidate were considered qualified to go on, which plaintiff contends he was not, he was certainly less qualified than the plaintiff who ranked higher in the overall test. All of these contentions were established in the court below: TR p 68, 20-25; TR p 69, 10-20; TR p 72, 9-25; TR p 73, 1-5; TR p 85, 25; TR p 86, 1-25; and TR p. 87, 1-25, A 86 through 92).

While Mr. Mendenhall kept mentioning here, and throughout his testimony, that the black persons who were taken from a lower place in rank order and moved past others who scored higher were moved there first because of their rank, it is clear that that is not true. If those lower than 20 were placed first based on their rank they would not have been invited; their rank order was only considered after it was determined that some people of a lower rank order would be invited or

referred because of their race. With that understood, taking the above testimony by the City's own policy maker, it is clear that the city considers the rank order of test scores as the only fair determiner of degree of qualification that they measure in this promotion process and that if a person scores lower in rank order on the tests they are indeed less qualified by the only fair measurement that the city applies; and that the measurement is by tests that the city has validated with the uniform guidelines and the Consent Decree in mind. It is clear that the city promoted an unqualified or at least less qualified person and that the decree did not require it to. Since the City indicated on the referral form that the Consent Decree mandated promotion of a black candidate, Donaghy has contended that the Consent Decree's goal became a

quota.

3. Does the fact that some unnamed and unknown White person in the past may, by reason of past racial discrimination in which the present applicant in no way participated, have received preference over some unidentified minority person with higher qualifications justify discriminating against the present better qualified applicant upon the basis of race?

Perhaps the consent decree had an earlier 8th Circuit Decision in mind when it included a paragraph specifically indicating that the Consent Decree did not require that a less qualified applicant be promoted over a more qualified one. It should be noted here that the Consent Decree included the

City's specific denial that it had discriminated in the past (Decree p. 2, Paragraph 4, A 92) and further that Sgt. Donaghy testified that his sergeant test was taken after the Consent Decree and that the test had to be retaken because a challenge by the Midwest Guardians. (TR 13,13-18, A 93). Sergeant Donaghy obviously did not benefit by any discrimination in his favor in that instance. Sgt. Donaghy is not saying that the court below entered an improper Consent Decree but only that to read it as the city does renders the remedy unacceptable constitutionally. Appeal Court, in Carter v.Gallagher correctly found that while Courts of equity have a broad power to fashion an effective remedy, that power does not afford a basis for depriving others of constitutionally protected rights. That Court indicated as follows:

"S. 1981 and the Fourteenth Amendment by their and unambiguous language accord equal rights to all persons regardless of race. We believe that S.1981 and the Fourteenth Amendment proscribe any discrimination in employment based on race, whether the discrimination be against Whites or Blacks. Our view is supported by Griggs v. Duke Power Co., 401 U.S. 424, 91 S. Ct. 849, 28 L.Ed. 2d, 158 (March 8, 1971), where it is held: "Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of

artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." (Cite)

Under the charter and the civil service provisions properly administered, preference is to be accorded to the fire fighter applicant having the highest rating. Under the Court's minority preference provision, a White person who, in a subsequently conducted examination fairly conducted and free of racial discrimination, obtains a higher rating than a minority person is denied employment solely because he is a White man. The fact that some unnamed and unknown White person in the past may, by reason of past racial discrimination in which the present applicant in no way participated, have received preference over some unidentified minority person

with higher qualifications is no justification for discriminating against the present better qualified applicant upon the basis of race.

In our view, no authority has been cited which would support such racial discrimination. We are convinced that the minority preference provision of the decree discriminates in favor of minority persons and against Whites whose qualifications are fairly established to be superior to minority persons given preference by the decree." Carter v. Gallagher 452 F.2d 315 (1971), 325. The instant case deals with a decree said to require minority preference after test results which were fairly obtained and free of discrimination and contrary to City Code. (TR p121, 1-25,p 122,1-25, A -93-96. The only difference is that here we are dealing with promotion rather than hiring. The discrimination herein

is just as obvious and just as wrong and just as proscribed by the Fourteenth Amendment and by Title VII.

The City of Omaha is fond of quoting Justice Stevens and should be aware that he said,

"... because racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based upon race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classifications be clearly identified and unquestionably legitimate."

City of Richmond v J.A. Croson Co., 109 S.Ct. 706(1989) Again looking at Richmond at 730 we can see that the Court was afraid of exactly what Sgt. Donaghy has said happened to him, that is that any black person, solely because he is

black, would be promoted because it is easier than other alternatives as a way to reach a specified percent of blacks.

"The city points to no evidence that qualified minority contractors have been passed over for city contracts or subcontracts, either as a group or in any individual case. Under such circumstances, it is simply impossible to say that the city has demonstrated "a stong basis in evidence for its conclusion that remedial action was necessary." Wygantt, 476 U.S., at 277, 106 S.Ct., at 1848. Proper findings in this regard are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects. Such findings also serve to assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal

of equality itself. Absent such findings, there is a danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics. "[I]f there is no duty to attempt either to measure the recovery by the wrong or to distribute that recovery within the injured class in an evenhanded way, our history will adequately support a legislative preference for almost any ethnic, religious, or racial group with the political strength to negotiate 'a piece of the action' for its members." (cite omitted)". City of Richmond, p. 730.

The argument that the consent decree could not trammel upon the constitutional rights of the Appellant in the manner that the City interpreted it is further supported by the Supreme Court of the United States as follows:

" Classifications based on race carry a danger of stigmatic harm. Unless they

are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.' See University of California of Regents v. Bakke, 438 U.S. at 298, 98 S.Ct. at 2752 (Opinion of Powell, J.) ("Preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth.") '

We thus reaffirm the view expressed by the plurality in Wygant that the standard of review under the equal protection clause is not dependent upon the race of those burdened or benefited by a particular classification." (City of Richmond, p. 706, 721)

In further reviewing the standard to be applied in Affirmative Action Programs, the City of Richmond Court has

discussed the requirement that the Affirmative - Action Plan must not merely identify race as the means of determining the characteristics of those people who are advantaged or disadvantaged but should seek a deeper review of the characteristics keeping the advantaged versus disadvantaged relationship. Put in better words the Court said, "Rather than engaging in debate over the proper standard of review to apply in Affirmative Action litiation it is more constructive to try to identify the characteristics of the advantaged and disadvantaged classes that may justify their disparate treatment. Here, instead of carefully identifying those characteristics, the City has merely engaged in a type of stereotypical analysis that is the hallmark of Equal Protection Clause violations. The class of persons benefited by the plan is not

limited to victims of past discrimination by white contractors in the City, but encompasses persons who have never been in business in the City, minority contractors who may have themselves been guilty of discrimination against other minority group members, and firms that have prospered notwithstanding discriminatory treatment. Similarly, although the plan unquestionably disadvantages some white contractors who are guilty of past discrimination against blacks, it also punishes some who discriminated only before it was forbidden by law and some who have never discriminated against anyone." City of Richmond, Supra. at 711. In the instant case the City of Omaha benefited a person never shown to have personally suffered at the hands of the City's discrimination at the cost of the rights of an individual never shown to have benefited

by the the city's discrimination.

CONCLUSION

It is clear that the Wilks decision and the Richmond decision have great impact upon Civil Rights matters and the current debates in the legislative bodies of the United States show that the very issues we a considering here are of great import in the minds of men. There is a past problem of discrimination that must be corrected, but, in making those corrections, the Constitution and previous Supreme Court guarantees by decisons as well as those of the Eighth Circuit can not be cast aside to promote underutilized groups only on the basis of race. Here the City of Omaha has implemented a plan which is

discriminatory and tries to justify it by claiming it is following a consent decree. Plaintiff has shown that the consent decree can not be used against his interest because he was not a party; that even if it could be used the Consent Decree clearly does not require the action taken by the City; that even if the consent decree did require those less qualified to be promoted over those more qualified, the Eighth Circuit, The Constitution of the United States, Title

VII, and the Supreme Court do not allow such promotions in the instant circumstances. Finally, it is clear that Sgt. Hadley was promoted because the City told the promoting authority that the consent decree mandated that a black be promoted. The consent decree contained only goals and goals do not mandate hiring a particular race at a particular

time - such strict requirements stop being goals and become clearly - QUOTAS. Wherefore Plaintiff Donaghy repectfuly requests that the Court hear these extremely important questions and decide them in his favor restoring equality for all as the jury herein attempted to do quite some time ago and as the Courts and Constitution did in the cited material.

Repectfully submitted,
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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-1780

THOMAS J. DONAGHY, Appellant, v. CITY OF OMAHA, A Municipal Corporation, Appellee. James Skinner, Chief of Police and P.J. Morgan, Mayor of Omaha	**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA**

Submitted: December 12, 1990

Filed: May 24, 1991

Before LAY, Chief Judge, HEANEY, Senior Circuit Judge, and FRIEDMAN,* Senior Circuit Judge.

HEANEY, Senior Circuit Judge.

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*The Honorable Daniel M. Friedman, United States Senior Circuit Judge for the Federal Circuit, sitting by designation.

Thomas Donaghy, a sergeant with the Omaha Police Department (OPD), brought this section 1983 action against the City of Omaha, its mayor, and its chief of police. Donaghy who is white, sought a promotion to lieutenant, but he was neither interviewed for nor promoted to the position. He claimed that the City discriminated against him by interviewing and promoting a black applicant, Anthony Hadley, who had more seniority but scored lower than Donaghy on tests the City used to rank job applicants. The City contended that it promoted Hadley to comply with a constitutionally valid, remedial consent decree. The district court agreed with the City and granted the City's motion for a directed verdict, setting aside a jury verdict that had awarded Donaghy $3,753 in damages. We affirm.

I.

BACKGROUND

A. The 1980 Consent Decree

In 1979, an organization of black police officers, the Brotherhood of Midwest Guardians (Guardians), filed suit against the City of Omaha, its mayor, and its police chief. The Guardians sought injunctive relief and damages. They alleged, among other things, that the OPD had engaged in discriminatory hiring and promotion practices: (1) by using qualification tests that had a disparate impact on blacks, even though the tests had not been shown to be job-related or predictive of job performance; (2) by promoting white officers instead of more qualified black officers; (3) by limiting

black officers' work assignments; (4) by refusing to recruit and hire blacks on an equal basis with whites; (5) by using other subjective hiring and promotiion procedures that discriminated against black applicants and black officers; and (6) by refusing to allow black officers the same specialized training opportunites available to white officers. In an amended complaint, the Guardians alleged that although the OPD had used funds from the Law Enforcement Assistance Administration (LEAA) in a discriminatory manner, the LEAA had continued to fund the OPD, in violation of 42 U.S.C. s 3766.

Senior Judge Richard E. Robinson permitted two white officers who ranked number one and two in competitive examinations for sergeant positions to intervene and contest the propriety of a

temporary restraining order and preliminary injunction. Donaghy's union did not ask to intervene. The court subsequently denied the Guardians' motion for a temporary restraining order and the Guardians' motion for a preliminary injunction.

The City responded to the Guardians' complaint with a general denial. Discovery proceeded. In the summer of 1980, the United States Department of Justice indicated to the City that it had an interest in the case. In July 1980, the City told the court that the United States Department of Justice and the City were in the process of negotiating a consent decree regarding the OPD's employment practices. The City asked the court to grant it more time to respond to the Guardians' requests for additional discovery, and

suggested that a consent decree between the United States and the City might "have a favorable impact" on the Midwest Guardians case. The court granted the City's request.

After at least three months of negotiations between the United States and the City, the United States filed a proposed consent decree with the court. At the same time, the United States filed an independent action the City, its personnel director, and its chief of police. The United States alleged that the City, through its police department, had violated nondiscrimination provision of 31 U.S.C. s 1242 and 42 U.S.C. s 3789d(c) (3). Specifically, the United States alleged that the City discriminated against blacks: (1) by not recruiting, hiring, assigning, and

promoting blacks on the same basis as whites; (2) by using examinations and other qualification standards that had a disparate impact on blacks but which had not been properly validated as predictive of job performance; and (3) by not taking affirmative action to correct the effect of past discriminatory practices. The United States alleged that as of October 1980, only 4.3% of the OPD's 560 sworn personnel were black; that of the 170 officers hired since 1972 only 4 officers, or 2.4% were black; and that of the 42 police officers hired in 1978, none were black.[1]

---

[1] The City's employment manager, Michael Mendenhall, corroborated these statistics at trial. He testified that when the consent decree was entered: (1) there were less than four percent blacks in the OPD; (2) that that percentage reflected a substantial imbalance compared to the population measured against; and (3) that the underutilization of blacks was prevalent in all ranks of the department.

The United States sought injunctive relief prohibiting the OPD from continuing discriminatory practices and from refusing to take remedial measures.

The City did not file an answer to the United States' complaint. Instead, on October 23, 1980, Senior Judge Robinson consolidated the United States' case with the Midwest Guardians' case and entered a consent decree order in settlement of both cases. The intervenors neither signed or objected to the consent decree.

The decree's stated purpose was to ensure that blacks were not disadvantaged by any of the OPD's past practices and policies, and to remedy these problems. Accordingly, paragraph 8 of the decree provided for, among other things, both interim and long-term goals:

Subject to the availability of qualified applicants, the City of Omaha will achieve a long term goal of hiring sufficient numbers of black sworn officers onto the OPD to result in an overall work force consisting of 9.5 percent black officers within seven years of the entry of this decree. In order to meet this long term goal, the City adopts the interim goals set out below for use on an annual basis in filling vacancies in sworn OPD positions.

(a) For the sworn entry position of police officer, the interim goal shall be to fill at least forty percent (40%) of all vacancies with qualified black applicants until such time as black officers constitute six percent (6%) of the overall sworn work force of the OPD. Thereafter, the interim goal shall be to fill at least one-third (33 1/3%) of all vacancies with qualified black applicants until such time as black officers constitute eight percent (8%) of the

overall sworn work force of the OPD. Thereafter, the interim goal shall be to fill at least twenty-five percent (25%) of all vacancies with qualified black applicants until the long term goal is achieved.

It is recognized that the City of Omaha has made substantial efforts to recruit black applicants for the sworn entry level position of police officer. The City shall maintain an active and continuing program of recruitment directed at increasing the number of black applicants for entry level positions to a level consistent with achieving this interim goal. The City shall solicit the suggestions of the Brotherhood of Midwest Guardians as to the most effective methods and techniques to be utilized in such a recruitment program.

(b) For promotional sworn positions in the OPD, the interim

> goal shall be to appoint qualified blacks in at least the proportion that these groups are represented in the classes of employees eligible for promotion.

Thus, the consent decree required the City to increase the number of black officers in its 560-member force from approximately 24 to 53 over seven years.

About five years later, the United States and the Guardians claimed the City was not following the decree. They sought a preliminary injunction that would bar the OPD from hiring entry-level police officers based on written tests the City had administered. In a thorough memorandum opinion, then-District Judge C. Arlen Beam granted the injunction in part, ruling that the City's written tests had an adverse impact on black applicants and were not validated within

the meaning of the Uniform Guidelines contained in 28 C.F.R. s 50.14.[2] The Court noted that the City's witness admited that the tests had never been formally validated, and the court concluded that the City had not shown a relationaship between an applicant's admission tests score and the applicant's job performance. The court enjoined the City from using the challenged written tests until those tests were validated. It further ordered the infusion of black candidates into the pool of entry level candidates to be interviewed. The court also urged the City to develop new

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[2] Likewise, nothing in this record demonstrates that the 1987 tests for the lieutenant positions were validated within the meaning of the Uniform Guidelines contained in 28 C.F.R. s 50.14.

testing and selection procedures consistent with the Uniform Guidelines, but acknowledged that the "Consent Decree does not require validation" and that "the City may use any selection process it chooses, provided that such process does not have an adverse impact upon black applicants."

B. Donaghy's Case

Donaghy, who had entered the OPD in 1977, became a sergeant in 1983. The City posted a notice for lieutenant positions in 1987; the notice set forth the three-phase examination process that would determine the promotion eligibility list.[3]

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[3] The first phase was open to all applicants. It included a multiple choice examination that tested knowledge

An applicant's performance during the examination process was important to an applicant's rank on the final promotion eligibility list, but not dispositive.

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3 (Footnote Continued) of both OPD operating procedures and the agreement between the Police Union and the City. Applicants would also be awarded additional credit for college achievement and service with the OPD. Thirty-five applicants would then be invited to participate in the second phase, which included a written examination called the "In-Basket." Because there were only thirty-four applicants, all went on to the second phase. The In-Basket examination, which presented applicants with situations they might encounter as a lieutenant, was supposed to measure administrative skills. The City then combined the scores from the first and second phases, ranked the applicants by score, and invited twenty applicants to the "Assessment Center," an oral examination which constituted the third phase of the selection process. The City invited the applicants ranked one through fifteen, the applicant ranked number twenty (a black), and the next four highest ranking blacks and women. The applicants ranked sixteen through nineteen were not invited to participate in the Assessment Center. After the Assessment Center, the City made its final ranking of twenty by combining the scores from the three examinations and adding points for service with the police department and college achievement.

The notice also stated that weight would be given to an applicant's experience and education, and that some applicants would be "referred based on the City's current Affirmative Action Plan."

Donaghy met the experience and training requirements for the lieutenant position and applied for the job. Based on his examination results, along with his credits for police service and college achievement, Donaghy ranked number seven on the final eligibility list, which was to last for two years.

Three lieutenant positions opened in April 1988. At this time only 3.2% of the lieutenants were black, while 10.7% of those eligible to be promoted to lieutenant were black. The City was thus below the interim goal set forth in paragraph 8(b) of the consent decree.

The personnel director sent the police chief a personnel requisition form that contained six names for the three positions which opened in April 1988.[4]

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[4] A City ordinance in effect at the time provided that if one position was to be filled, the personnel director was to submit to the department head (here, the police chief) the "three highest names on the appropriate list." If more than one position was to be filled, as was the case in April 1988, the personnel director was to submit twice as many eligible candidates as there were vacancies. The City ordinance also provided that the candidates "be certified in strict order of standing on the list except in cases where the personnel director has determined there is good reason for certification of eligibles with special qualifications."

A reminder attached to the requisition form containing the six names stated:

> REMINDER REGARDING
> ATTACHED CANDIDATES
>
> Attached is a P-20 which lists candidates for the vacant position(s) in your department.

City officials testified that to comply with the consent decree, they could not submit the top six names from the list, as there were no black candidates among the applicants ranked one through six. Instead, the personnel director submitted the top five names and the applicant ranked number thirteen, Anthony Hadley, who was the top-ranking black on the final list. Hadley, like Donaghy, fully met the qualifications the OPD set for the the lieutenant position.

The police chief could pick any

4(Footnote Continued)
There is an underutilization in the EEO category in which this position is grouped. The underutilization applies to:

X Minorities

X Females

NOTE: IN ORDER TO COMPLY WITH THE CONSENT DECREE, A BLACK CANDIDATE MUST BE SELECTED.

three applicants from the list of six submitted, and he chose the applicants ranked one and two (Steve Coufal, a white male, and Gary Becerra, an Hispanic male), and Hadley. The mayor concurred with the police chief's recommendation and promoted Coufal, Becerra, and Hadley. The mayor testified he promoted Hadley because Hadley was qualified for the job, and because "it might have also helped meet the requirements of the agreement that was reached [in the consent decree]."[5] The remaining three applicants from the short list of six were returned to the promotion eligibility list. This left Donaghy ranked number five among remaining candidates.

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[5] Before Hadley's promotion, only 1 of the OPD's 31 lieutenants was black.

Another opening developed in August 1988. Pursuant to the City ordinance, the personnel director sent the police chief a personnel requisition form with three names (Davitt, Cavanaugh, and Farmer) on it. The city promoted the candidate ranked number three (a white male) and returned the other two candidates to the list (including a black candidate). This left Donaghy ranked number four among the remaining candidates on the promotion eligibility list.

Finally, one more vacancy appeared in July 1989. Pursuant to a new City ordinance, the personnel director referred the top three names on the list (Cavanaugh, Hauptman, and Tostenson), plus an affirmative action candidate (Farmer). Because the personnel director did not refer Donaghy to the police

chief, Donaghy was not considered for this position. The candidate ranked number five, a white female, was promoted, while the other three, including Farmer, were returned to the list.

Donaghy then filed a section 1983 suit against the City of Omaha, the mayor, and the police chief.[6] Donaghy alleged that the police department did not promote whites on a basis equal with blacks, ignored rank order for promotion, and promoted a black person to lieutenant even though Donaghy was more qualified than the black applicant. Donaghy did

[6] Donaghy also filed claims under 42 U.S.C. s 1981. The district court dismissed these claims before it submitted the case to the jury, and Donaghy does not appeal that decision.

not challenge the validity of the consent decree in his complaint. He did not claim that the consent decree was entered into for something other than a remedial purpose or that the consent decree was not narrowly tailored to achieve its purpose.

The City asserted as a defense in its answer that it acted in accordance with the 1980 consent decree. In addition, the City claimed that Donaghy's complaint was an "impermissible collateral attack" upon the consent decree. After the defendants had filed their answer, however, the Supreme Court disapproved of the impermissible collateral attack doctrine in Martin v. Wilks, 104 L. Ed. 2d 835 (1989). Accordingly, the case remained on the trial calendar, and Donaghy had the opportunity to prove that the consent

decree was not remedial or was not narrowly tailored to its claimed remedial purpose. The case was tried before a jury.

The City moved for a directed verdict at the close of the plaintiff's evidence. The court denied the motion, although it had a "very grave doubt" that Donaghy had made out a prima facie case. At the close of the City's case and after Donaghy's rebuttal, the City renewed its motion for a directed verdict. The court reserved ruling and sent the case to the jury, which found for two of the defendants (the mayor and the police chief),[7] but against the City of Omaha. The jury awarded Donaghy $3,753 in damages.

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[7] Donaghy does not contest the jury's verdict in favor of the mayor and the police chief.

The court received the verdict but ordered entry of judgment withheld pending ruling upon the City's motion for a directed verdict. Donaghy later asked the court to enter judgment on his behalf, but the court instead scheduled a hearing on the City's directed verdict motion on which it had reserved ruling. After the hearing, the court granted the City's motion for a directed verdict. The court stated:

> Donaghy has presented no competent evidence that any City of Omaha official or employee acted toward him with discriminatory intent or with reckless disregard of his rights. He presented evidence that the City had tested and evaluated candidates with regard to a number of factors, including race. However, when viewed in the light most favorable to the plaintiff, and in the context of an uncontrovertedly valid, judicially-imposed consent decree, the evidence presented shows, at most, that the City was merely complying with a consent decree that required the City to consider race, among other attributes, in evaluating can-

didates for promotion to lieutenant.

Donaghy relies upon Martin v. Wilks. . . . for the proposition that the existence of a consent decree cannot be used to validate race-conscious employment decisions . . .

That reliance is misplaced. In Wilks the issue was whether the existence of a consent decree barred any challenge to race-conscious employment decisions purportedly based upon that decree, on the grounds that such a challenge constituted an "impermissible collateral attack on the consent decree[]" . . . Holding that dismissalon such grounds was improper, the United States Supreme Court affirmed the Eleventh Circuit's remand of the case for trial on reverse discrimination claims . . .

In contrast, Donaghy has had his day in court; he was provided the opportunity to [contest] employment-related

decisions made in the context of a consent decree.

II.

DISCUSSION

A. Standing

Donaghy claims that he was injured due to the City's race-conscious employment decisions. He contends that if the City had ignored race and strictly followed rank order in the referral and promotion process, he would have had the opportunity to interview for the lieutenant position. Because federal courts are under an independent obligation to examine their own jurisdiction, FW/PBS,

Inc. v. City of Dallas, 107 L. Ed. 2d 603, 621 (1990), we address whether Donaghy has standing to bring this claim.

If applicants had been referred to the police chief in strict rank order pursuant to ordinance, only the six top-ranking candidates would have been referred for the three openings that appeared in April 1988. Neither Donaghy nor Hadley would have been referred to the police chief for consideration and neither of them could have been promoted to lieutenant. Three of the top six candidates would have been promoted, three would have been returned to the

list, leaving Donaghy now fourth in line among remaining candidates:[8]

List Rank	Decision
1	promoted
2	promoted
3	promoted
4	returned to list
5	returned to list
6	returned to list
7(Donaghy)	returned to list

If rank order had been followed again in August 1988, the next three

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[8] For purposes of illustration, we assume that the top applicant or applicants would have been hired. Under the City ordinance, the police chief and the mayor were free to hire any of the candidates referred to them. They did not have to hire based on rank order.

candidates on the list would have been referred for consideration. One of the three would have been promoted and the other two would have returned to the list, leaving Donaghy now third in line among the remaining candidates on the list:

List Rank	Decision
4	promoted
5	returned to list
6	returned to list
7(Donaghy)	

Donaghy would lack standing to bring this case if the list had expired at this point. As the foregoing shows, Donaghy could not have been considered for the April and August 1988 lieutenant positions even if rank order had been strictly followed, so the City's decision to interview and promote Hadley could not have caused him a "distinct and palpable

injury." See Warth v. Seldin, 422 U.S. 490, 501 (1975).

The list, however, did not expire, and another opening appeared in July 1989. Had rank order been followed then, the personnel director would have referred Donaghy for the July 1989 opening, along with three other candidates:

> List rank of candidates who would have been considered for July 1989 opening had rank order been strictly followed
>
> 5
> 6
> 7 (Donaghy)
> 13 (affirmative action candidate referred pursuant to new City ordinance)

There is no guarantee that Donaghy would have been promoted to the July 1989 position. One of Donaghy's claims, however, was that the City denied Donaghy

the opportunity to compete for the July 1989 promotion by not strictly following rank order in the referral process and by promoting Hadley in the first round. We find he has standing to raise that claim.

We note, however, that Donaghy lacks standing to complain about the City's decisions to interview Hadley for the April 1988 postion and to interview Farmer for the August 1988 and July 1989 positions. If Hadley, or any other candidate who scored lower than Donaghy, had been interviewed but not promoted in April and August 1988, Donaghy would have been able to interview for the July 1989

position, and would have suffered no injury.[9]

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[9] If Hadley had not been hired in April 1988, Donaghy would have been left fourth in rank among remaining applicants:

List Rank		Decision
1		promoted
2		promoted
3		promoted
4		returned to list
5		returned to list
6		
7	(Donaghy)	
8	(Hadley)	returned to list

If Hadley had not been promoted for the August 1988 postion, Donaghy would then be third in rank among remaining applicants:

List Rank		Decision
4		promoted
5		returned to list
6		
7	(Donaghy)	
13	(Hadley)	returned to list

This would leave Donaghy eligible to be interviewed for the July 1989 position, because the City would have referred the three top-ranked candidates (which would include Donaghy), along with an affirmative action candidate, presumably Hadley.

We mention this because it affects the issues we consider on this appeal. Although the City had a general affirmative action plan, that plan did not dictate the employment decision that Donaghy has standing to challenge (Hadley's promotion). The uncontroverted evidence at trial showed that the City's decision to promote Hadley was due to its belief that the consent decree required it to take this action. The affirmative action plan was not relevant to that decision, and Donaghy conceded as much in his closing remarks to the jury. We thus do not discuss the City's general affirmative action plan here.

B. Martin v. Wilks

Before 1989, most circuits had held that plaintiff such as Donaghy could

not challenge race-conscious employment decisions made pursuant to a consent decree, even if the plaintiffs were not parties to the consent decree. See Martin v. Wilks, 104 L. Ed. at 845 n.3 (listing cases). These circuits had held that by failing to timely intervene in the intitial proceeding, a party was foreclosed from later challenging actions taken under the consent decree, because such a challenge would constitute an impermissible collateral attack on the consent decree. Id. at 844-45.

The Supreme Court, however, rejected the impermissible collateral attack in Martin v. Wilks. In that case, a group of white Birmingham fire fighters claimed that promotion decisions made in reliance on consent decrees violated the Constitution and Title VII. The City

admitted to making race-conscious employment decisions, but argued that the decisions were unassailable because they were made pursuant to the consent decree. The district court granted the City's motion to dismiss, but the Eleventh Circuit reversed, and the Supreme Court affirmed. Wilks, 104 L. Ed. 2d at 842-44.

In the Court's view, the flaw in the district court's decision was that the "District Court may have been affected by the mistaken view that respondents' claims on the merits were barred to the extent they were inconsistent with the consent decree." Id. at 849. The Court held that the fire fighters, who were not parties to the original action which produced the consent decree, could not be barred absolutely from challenging employment

decisions made pursuant to the decree. Id. at 844 (agreeing with the Eleventh Circuit's view that because white fire fighters were "neither parties nor privies to the consent decrees, . . . their independent claims of unlawful discrimination are not precluded"); id. at 847-48 ("No one can seriously contend that an employer might successfully defend against a Title VII claim by one group of employees on the ground that its actions were required by an earlier decree entered in a suit brought against it by another, if the later group did not have adequate notice or knowledge of the earlier suit.").

Donaghy, however, apparently would have us read Wilks as nullifying all consent decrees with respect to nonparties. Under Donaghy's reasoning, if an employer is operating under a

constitutionally valid consent decree that requires the employer to make race-conscious employment decisions, the employer still could not make race-conscious employment decisions that would in any way affect nonparties to the consent decree. Accordingly, Donaghy claims that Wilks mandated the following jury instruction and that the trial judge erred by refusing to submit it to the jury:

> Plaintiff claims that the defendants violated Section 1983 of Title 42 of the United States Code thereby depriving him of his constitutional right to equal protection of the law. Defendants have asserted that they relied upon a Consent Decree entered in the case of the Brotherhood of Midwest Guardians v [.] The City of Omaha in making any promotion related race conscious decisions. You are instructed that a person cannot be deprived of his legal rights in a proceeding to which he is not a party. If you find that the plaintiff was not a party to the Consent Decree the defendants cannot rely upon it as a basis to

> deprive the plaintiff of his rights and you must find for the plaintiff.

We disagree. In our view, the trial court properly rejected this misleading instruction.

The flaw in Donaghy's proposed instruction is that it equates the right to challenge a consent decree with a general right to be free of race-conscious employment decisions taken pursuant to a consent decree. Wilks does not create Donaghy's proposed general right. While Wilks permits a nonparty to challenge the validity of employment decisions made pursuant to a consent decree, it does not speak to whether a particular race-conscious employment decision taken pursuant to a consent decree will meet constitutional standards. Donaghy seems to argue that

all race-conscious remedies are unconstitutional, notwithstanding the Supreme Court's repeated statements that certain narrowly tailored, remedial, race-conscious employment decisions are permitted under the Constitution.[10] Nothing in Wilks disturbs these

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[10] See United States v. Paradise, 480 U.S. 149, 166 (1987) (plurality); id. at 189-90 (Stevens, J., concurring); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280-81, 283-84 (1986) (plurality) (hiring goals proper means to remedy effects of prior discrimination); id. at 286 (O'Connor, J., concurring); Fullilove v. Klutznick, 448 U.S. 448, 482-83 (1980) (plurality) (minority business set-asides proper); id. at 520 (Marshall, J., concurring); cf. City of Richmond v. J.A.Croson Co., 488 U.S. 469, 498-500 (1989) (insufficient proof that set-aside program was remedial). The Court has suggested that goals which affect hiring and promotion, as here, are more acceptable than those imposing layoffs. See United States v. Paradise, 480 U.S. at 188-89 (Powell, J., concurring); Wygant 476 U.S. at 282-84 (plurality(; id. at 294-95 (White, J., concurring).

cases,[11] or other substantive law governing reverse discrimination challenges to consent decrees which require race-conscious affirmative action. Wilks simply holds that those who did not participate and were not represented in prior consent decree litigation may have the opportunity to "ask a court to consider their claims that actions taken pursuant to the consent decree are unlawful under the governing statutory and constitutional

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[11] Indeed, the Eleventh Circuit remanded the Wilks case for trial on the discrimination claims and suggested that the operative law for judging the contested consent decrres was that governing voluntary affirmative action plans. In re Birmingham Reverse Discrimination Employment Litig., 833 F.2d 1492, 1500-01 (11th Cir. 1987). While the Supreme Court did not expressly approve of this standard when it affirmed the Eleventh Circuit's decision, it did approve of the Eleventh Circuit's decision to remand for a trial on the merits with instructions to the district court that it not consider notions of preclusion or impermissible collateral attack. Wilks, 104 L.Ed.2d at 849.

standards." Selig, Affirmative Action in Employment after Croson and Martin: The Legacy Remains Intact, 63 Temple L. Rev. 1, 21 (1990). Here, the district court followed Wilks and gave Donaghy precisely the opportunity that Wilks requires: the opportunity to prove that the race-conscious measures taken pursuant to the consent decree were invalid because the consent decree (1) did not serve a remedial purpose, or (2) was not tailored narrowly enough. Donaghy was not foreclosed from presenting his case, so we turn to the merits of his reverse discrimination claim.

C. Standards Governing Reverse Discrimination Claims

The validity of a consent

decree's affirmative action plan is a question of law. See Sisco v. J. S. Alberici Const. Co., 655 F. 2d 146, 149 (8th Cir. 1981), cert. denied, 455 U.S. 976 (1982). As with any other section 1983 suit, a plaintiff making a reverse discrimination challenge under section 1983 against an employment decision bears the burden of proving his or her rights were violated. Wygant, 476 U.S. at 277-78 (plurality); id. at 292 (O'Connor, J., concurring). In a reverse discrimination case, "the satisfaction of the four part McDonnell test will not necessarily show a prima facie violation" of section 1983 where the evidence demonstrates that the "plaintiff's treatment by the employer was pursuant to a bona fide affirmative action plan." Warsocki v. City of Omaha, 726 F.2d 1358, 1360 & n.3 (8th Cir. 1984) (quoting Setser v. Novack Inv. Co., 657

F.2d 962, 968 (8th Cir. 1981) (en banc)).

To demonstrate that a purportedly remedial affirmative action plan is bona fide, an employer must first show the plan is indeed remedial. Thus, we require an employer to have identified a conspicuous racial imbalance in its work force in order to "ensure that new forms of invidious discrimination are not approved in the guise of remedial affirmative action." Setser, 657 F.2d at 968. Second, the employer must show that the plan which seeks to remedy effects of past discrimination is narrowly tailored to meet that goal. See Wygant, 476 U.S. at 279-81 (plurality) (reviewing cases); cf. Croson, 488 U.S. at 507 (majority) (set-aside plan not narrowly tailored). The plaintiff then has the burden to show

that some reason other than a remedial one motivated the employer when implementing the plan or that the plan adopted unreasonably exceeds its remedial purpose. See Warsocki, 726 F.2d at 1360-61; see also Wygant, 476 U.S. at 292-93 (O'Connor, J., concurring); Setser, 657 F.2d at 969 (reverse discrimination claim under s 1981).

For example, in the context of a reverse discrimination challenge to a school board's voluntary affirmative action plan, Justice O'Connor observed that

> . . . nonminority teachers could easily demonstrate that the purpose and effect of the plan is to impose a race-based classification. But when the Board introduces its statistical proof as evidence of its remedial purpose, thereby supplying the court with the means for determining that the Board had a firm basis for concluding that reme-

> dial action was appropriate, it is incumbent upon the nonminority teachers to prove their case; they continue to bear the ultimate burden of persuading the court that the Board's evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently "narrowly tailored."

Wygant, 476 U.S. at 292-93 (O'Connor, J., concurring); see also id. at 277-78 (plurality) (trial court must find that employer had strong basis in evidence for its conclusion that remedial action was necessary); cf. Croson, 488 U.S. at 510 (plurality) (in context of legislatively mandated minority business set-asides, City failed to show it had a strong basis in evidence for its conclusion that remedial action was necessary). Formal findings of past discrimination need not precede a public employer's adoption of a remedial affirmative action plan.

Wygant, 476 U.S. at 289-92 (O'Connor, J., concurring) (giving policy reasons); id. at 304-05, 312 n.7 (Marshall, J., dissenting); id. at 313 (Stevens, J., dissenting); see also id. at 277-78 (plurality) (public employers need convincing evidence that remedial action is warranted); cf. Croson, 488 U.S. at 519 (Kennedy, J., concurring) (in context of legislatively mandated set-asides, evidence that would support a judicial finding of intentional-discrimination may suffice to justify remedial legislative action for it diminishes constitutional responsibility of political branches to say they may not act until ordered to do so by a court).

In a reverse discrimination case challenging a consent decree's affirmative action plan, the legal standards will be similar but not

identical to those used when assessing a public employer's voluntary affirmative action plan. An affirmative action consent decree stands somewhere in between a voluntary affirmative action program (as in Wygant) and a remedial plan that a court has imposed after making a formal finding of intentional discrimination (as in United States v. Paradise, 480 U.S. 149 (1987), for a consent decree is a hybrid that has "attributes both of contracts and of judicial decrees." Local 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 519 (1986) (quoting United States v. ITT Continental Baking Co., 420 U.S. 223, 236 n.10 (1975). Unlike a voluntary affirmative action plan, a consent decree is subject to court approval before it can take effect, is often approved only after a fairness hearing, and commonly remains under the

court's jurisdiction for a number of years. Because a federal court is not just a "recorder of contracts," but "an organ of government constituted to make judicial decisions," a consent decree must meet three requirements. First, it must "spring from and serve to resolve a dispute within the court's subject matter jurisdiction;" second, it must "come within the general scope of the case made by the pleadings;" and third, it must "further the objectives of the law upon which the complaint was based." Local 93, 478 U.S. at 525. While the entry of an affirmative action consent decree does not guarantee that the decree serves a remedial purpose of is narrowly tailored, the heightened judicial oversight inherent in a properly entered decree helps attain that end.

Accordingly, this court has

D. Donaghy's Reverse Discrimination Claim

Donaghy introduced evidence that race was a factor in the City's decision to hire Hadley. The City, however, demonstrated (1) that the decree's purpose was remedial and a response to a racial imbalance, and (2) that the plan was narrowly tailored. Donaghy did not rebut this evidence, and the trial court properly directed a verdict in favor of the City.

The City demonstrated the remedial purpose of the consent decree. It was introduced into evidence, and officials for the City testified that they referred Hadley for the position and promoted him because he was qualified and

recognized that when an employer is called upon to show a remedial purpose, the employer can meet its burden by producing evidence "that the employer implemented its plan . . . in adherence to a court order, whether entered by consent or after litigation." Setser v. Novack Inv. Co., 657 F.2d 962, 968 (8th Cir. 1981) (en banc), cert. denied, 454 U.S. 1064 (1981). As with a voluntary affirmative action plan, an employer subject to a consent decree plan must also demonstrate that the plan was a response to a conspicuous racial imbalance in its work force, and that the plan is sufficiently narrowly tailored to the remedial purpose.

because they believed his promotion was required by the decree. This indicates a remedial purpose. See Setser, 657 F.2d at 968. 969 (absent rebuttal evidence, remedial purpose shown where the employer implemented its plan in adherence to a court order entered by consent or after litigation).

The City also demonstrated that the plan was a response to a conspicuous racial imbalance in its work force. Testimony established that when the consent decree was entered: (1) there were less than four percent blacks in the OPD; (2) this percentage reflected a substantial imbalance compared to the population measured against; and (3) the underutilization of blacks was prevalent in all ranks of the department. This

testimony corroborated the statistics included in the United States' complaint, some of which presented a strong inference of discrimination: of the 42 officers hired in 1978, none was black. See International Bhd. of Teamsters v. United States, 431 U.S. 324, 342 n.23 (1977) (inference of discrimination came from "the inexorable zero").

Moreover, Senior Judge Robinson stated in the jury instructions that before he had entered the consent decree, he had reviewed the consent decree to determine that it was lawful, reasonable, and equitable. He stated that the decree's purpose was to overcome "an apparent imbalance reflecting the underutilization of black persons" in the OPD, that it set goals to meet that end, and that the City could be required to

make race-conscious decisions in promotions to meet those goals. This instruction reflected Senior Judge Robinson's experience with the case, as he had presided over much of the consolidated Midwest Guardians actions and had approved the consent decree before he presided over Donaghy's trial.

Donaghy did not present evidence to rebut the City's showing that the plan was remedial and a response to a racial imbalance. he did not challenge the propriety of the procedure that led to the decree. He did not challenge the statistical basis for the decree, and he admitted during closing argument that there had been an underrespresentation of blacks in the OPD when the consent decree

was entered. All Donaghy did to contest the decree was to state he was not a party to the original action, and to point to language in the consent decree in which the City disclaimed liability.

Neither of these arguments persuades us that the consent decree was not remedial. Although Donaghy was not a party to the consent decree, his presence was not necessary to ensure the propriety of the decree, and the record fully supports the district court's decision that the consent decree was remedial and was narrowly tailored. While the consent decree contains a formal disclaimer of

liability,[12] little weight can be given to disclaimers of this nature, and the City never denied the accurace of the statistics the United States presented in its complaint. See Kirkland v. New York State Dep't of Correctional Servs., 711 F.2d 1117, 1131 n.16 (2d Cir. 1983), cert. denied, 465 U.S. 1005 (1984); United States v. City of Alexandria, 614 F.2d 1358, 1365 n. 15 (5th Cir. 1980).

The City also demonstrated that the decree's plan was tailored narrowly enough to meet its remedial purpose. It

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[12] Paragraph 4 of the decree provided that:

> The City of Omaha expressly denies that it is or has been guilty of any wrong-doing. It is understood that this Decree does not in any manner constitute and admission by the Defendants that they have intentionally or knowingly violated any federal law prohibiting discrimination in employment on the basis of race or color.

required the City to hire approximately 29 additional qualified blacks over seven years, and it gave the City wide latitude to achieve that goal. Because the consent decree's interim and long-term goals applied only to blacks, the minority group identified as being underutilized, the plan was not overinclusive. Compare Croson, 488 U.S. at 506 (majority) (questioning how a purportedly remedial minority business set-aside could be narrrowly tailored where plan included minorities never identified in any way as having sufferd from discrimination in the area); Wygant, 476 U.S. at 284 n.13 (plurality) (voluntary affirmative action plan "undifferentiated" where no apparent reason why certain minority groups were included in preferences). Although the plan set a long-term goal, that goal could be waived because it was "subject

to the availability of qualified applicants." The plan did not require the City either to hire the unqualified or to hire unnecessary personnel in order to meet the long-term or interim goals. See Paradise, 480 U.S. at 177-78 (plurality) (remedy flexible because it required qualifed applicants and did not require "gratuitous promotions"). Moreover, the interim promotion goal was directly tied to the relevant work force, namely the percentage of qualified blacks eligible for promotion within the OPD. See Croson, 488 U.S. at 501-02 (majority) (discussing relevant labor market in employment context); see also Paradise, 480 U.S. at 179 (plurality); id. at 187 (Powell, J., concurring) (when determining whether a remedy is narrowly tailored, a court may examine the relationship between the percentage of minority workers to be employed and the

percentage of minority group members in the relevant population or work force). Finally, the consent decree was limited in duration to seven years.

Donaghy's only argument in response to this evidence was that race-conscious goals were inappropriate because the City instead could have made education and training programs available, presumably so that the test scores of blacks would improve. The fact is, however, that the consent decree contained such alternative measures, including training programs.[13]

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[13] Paragraph 13 of the consent decree provided:

> In order to ensure that all employees ahve equal opportunities toimprove their performance on the job and to advance in the ranks of the OPD, the City shall provide black sworn employees of the OPD with access to all interal and external training courses equal to that of all other sworn employees.

Moreover, the "tailoring" requirement is to be interpreted both carefully and flexibly, for there is no universal answer to the problem of remedying racial discrimination, and "the choice of remedies to redress racial discrimination is a balancing process left, within appropriate constitutional or statutory limits, to the sound discretion of the trial court." Paradise, 480 U.S. at 184 (plurality) (quoting Fullilove, 448 U.S. at 508). The remedial purpose of the

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13 (Footnote Continued) A description of any training course available to sworn personnel of the OPD shall be prominently posted in areas where it will be visible to all officers at least two weeks prior to the time when selections for that course are to be made. The description shall inform officers of the requirements for eligibility for the course and shall provide a date by which interested persons must submit applications for the course. Selection of officers to attend training courses shall be made in a nondiscriminatory manner from the applications submitted and in accordance with the needs of the OPD.

consent decree entered by the trial court was to increase the number of qualified black officers in the OPD, and the consent decree was a carefully made tool designed to attain that end. See Paradise, 480 U.S. at 185 (plurality) (setting forth factors that determine whether race-conscious remedies are narrowly tailored).

Given this record, we agree with the district court that the consent decree was "uncontrovertedly valid." Because the City demonstrated that the consent decree plan was remedial and narrowly tailored to that end, and because Donaghy never demonstrated that some reason other than a remedial one motivated the employer when implementing the plan or that the plan adopted unreasonably exceeded its remedial purpose, the challenged employment

decision made pursuant to the consent decree did not violate Donaghy's constitutional rights.[14] We affirm the judgment of the district court.

A true copy.

Attest.

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[14] We find no merit to Donaghy's contention that the consent decree did not require the City to promote Hadley. There is no question that Hadley was a qualified black eligible for the promotion and that when he applied for the promotion, the percentage of black lieutenants on the force was far less than the percentage of black sergenats eligible for promotion. One of the consent decree's interim goals required the City to increase the number of black lieutenants in the OPD by promoting qualified black applicants. The City met this obligation by promoting Hadley. The consent decree plainly gave the City flexibility with respect to meeting the interim and long-term goals -- goals which Donaghy did not effectively challenge.

Donaghy also claims that under Fed. R. Civ. P. 50(b), the trial court was without jurisdiction to enter the directed verdict, because it did so more

[14](Footnote Continued)
than ten days after the jury returned its verdict and the City had not filed a timely motion for a JNOV. The current rule requires a motion within ten days after entry of judgment. Here, the judge withheld entry of judgment pending ruling on the City's motion for a directed verdict, so the City was not required to file any motion within ten days. See Nichols Constr. Co. v. Cessna Aircraft Co., 808 F.2d 340, 354-56 (5th Cir. 1985).

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-178ONE THOMAS DONAGHY, Appellant, vs. CITY OF OMAHA, etc., Appellee. James Skinner, Chief of Police and P.J.Morgan, Mayor of Omaha	**ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC**

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc. Judge Beam took no part in the consideration or decision of the petition.

The petition for rehearing is also ordered denied.

August 7, 1991

Order Entered at the Direction of the Court:

s/ Michael E. Gans
Clerk, U.S. Court of Appeals,
Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-178ONE THOMAS DONAGHY, Appellant, vs. CITY OF OMAHA, A Municipal, Corporation, Appellee. James Skinner, Chief of Police and P.J.Morgan, Mayor of Omaha	**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA**

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

May 24, 1991

A true copy.

ATTEST: s/Michael E. Gans,
Acting Clerk
Clerk, U.S.Court of Appeals,
Eighth Circuit

MANDATE ISSUED: 8/16/91

FILED U.S.DISTRICT COURT
OF NEBRASKA 91 AUG 19 AM 9:48
NORBERT H. EBEL, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

THOMAS J. DONAGHY, Plaintiff, vs. CITY OF OMAHA, a municipal corporation, JAMES SKINNER, Chief of Police, and P.J. MORGAN, Mayor of Omaha, Defendants.	CASE NO. CV 88-0-321 **AMENDED MEMORANDUM OPINION AND ORDER**

IT APPEARING to the Court that the Memorandum Opinion and Order heretofore entered in the above-captioned cause does not correctly state the opinion of the Court by reason of inadvertence by the Court; therefore,

IT IS ORDERED that the Memorandum Opinion and Order, and the record thereof, be amended nunc pro tunc to read as follows:

(1) the phrase "or with reckless

disregard for his rights" is appended to the sentence previously reading: "Donaghy has presented no competent evidence that City acting toward him with discriminatory intent. . . ."

(2) the phrase "or reckless" should be inserted as follows into the sentence previously reading "The issue before this Court is whether he has presented a prima facie case for intentional [or *reckless*] deprivation of his protected rights."

The amended Memorandum Opinion and Order reads as follows; the inserted phrases are in italic, and underlined.

THIS MATTER is before the Court upon Defendant City of Omaha's motion for a directed verdict, made at the close of Plaintiff Thomas J. Donaghy's case in chief and renewed at

the close of trial. The Court had reserved ruling on the motion; upon careful consideration the Court now finds, for the reasons stated below, that the motion for a directed verdict should have been sustained, and the case should not have been submitted to the jury. Accordingly, the Court will direct that a verdict be entered in favor of the Defendant City of Omaha.

I. BACKGROUND

This action was brought pursuant to 42 U.S.C. Sections 1981 and 1983, seeking damages for the perceived discrimination against the plaintiff, a caucasian police officer, and in favor of a black police officer. Specifically, Donaghy complained that he was improperly excluded from a list of candidates presented for consideration for

promotion, and that a less-qualified black officer was included.

Defendants were the City of Omaha and, in their official capacities only, the Mayor of Omaha, P.J.Morgan and the Chief of Police, James Skinner. The Section 1981 claim was dismissed at the close of trial, and is no longer at issue.

Trial was commenced on March 13, 1990. As noted above, defendants moved for a directed verdict at the close of plaintiff's argument, and renewed that motion at the close of trial. The Court reserved ruling on the motion. In reserving its ruling, the Court stated that in its view the motions were warranted, but that the prudent and preferred course would be to reserve ruling until after the jury returned a verdict.

On March 15 the jury returned a

verdict of $3,753.00 against the City of Omaha, and found for the remaining two defendants. The Court directed that the verdict be filed, but ordered that entry of judgment be withheld until it ruled upon the pending motion to dismiss.

A hearing on the matter was held on April 4, 1990.

II. CONCLUSIONS OF LAW

"The standard for granting a motion for a directed verdict is whether the evidence, when viewed in the light most favorable to the moving party, is such that reasonable people could only conclude that the movant should prevail." *Bernoudy v. Dura-Bond Concrete Restoration, Inc.*, 828 F.2d 1316, 1319 (8th Cir. 1987).

Before sustaining such a motion, the Court must:

> (1) resolve direct factual conflicts in favor of the nonmovant, (2) assume as true all facts supporting the nonmovant which the evidence tended to prove, (3) give the nonmovant the benefit of all reasonable inferences, and (4) deny the motion if the evidence so viewed would allow reasonable jurors to differ as to the conclusions that could be drawn.

City of Omaha Employees Betterment Association v. Omaha, 883 F.2d 650, 651 (8th Cir. 1989); *Jones v. Edwards*, 770 F.2d 739, 740 (8th Cir. 1985).

Applying this standard to the instant case, the Court finds that a directed verdict should be granted, since the plaintiff has failed to present sufficient evidence to support a prima facie case of actionable discrimination.

State of mind is a key component of an action brought under 42 U.S.C Section 1983, since a plaintiff must present evidence, *inter alia*, that the defendant intentionally or recklessly

deprived him of a federal right. *Reese v. Kennedy*, 865 F.2d 186, 187, n.2 (8th Cir. 1989); *Daniels v. Williams*, 474 U.S. 327, 328, 106 S.Ct. 662, _____, 88 L.Ed. 2d 682, _____ (1986) (Holding that "[w]e conclude that the Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or property"' emphasis in original).

Donaghy has presented no competent evidence that any City of Omaha official or employee acted toward him with discriminatory intent or with reckless disregard of his rights. He presented evidence that the City had tested and evaluated candidates with regard to a number of factors, including race. However, when viewed in the light most favorable to the plaintiff, and in the context of an uncontrovertedly valid, judicially-imposed consent decree, the

evidence presented shows, at most, that the City was merely complying with a consent decree that required the City to consider race, among other attributes, in evaluating candidates for promotion to lileutenant.

Donaghy relies upon *Martin v. Wilks*, ____ U.S. _____, 109 S.Ct. 2180, 104 L.Ed. 2d 834 (1989) for the proposition that the existence of a consent decree cannot be used to validate race-conscious employment decisions. Plaintiff's Trial Brief at 7 (stating that "this consideration for promotion is racially discriminatory and not a permissible remedy in a consent decree of this type as pointed out in *Martin v. Wilks*, supra").

That reliance is misplaced. In *Wilks* the issue was whether the existence of a consent decree barred any challenge to race-conscious employment decisions

purportedly based upon that decree, on the grounds that such a challenge constituted an "impermissible collateral attack on the consent decree[]." ____U.S. at ____, 109 S.Ct. at 2183, 104 L.Ed. 2d at _____. Holding that dismissal on such grounds was improper, the United States Supreme Court affirmed the Eleventh Circuit's remand of the case for trial on reverse discrimination claims. ____U.S. at _____, 109 S.Ct. at 2188, 104 L.Ed 2d_____.

In contrast, Donaghy has had his day in court; he was provided the opportunity to employment-related decisions made in the context of a consent decree. The issue before this Court is whether he has established a prima facie case for intentional or reckless deprivation of his protected rights. In that context, *Wilks* does not require that a judicial consent decree be

found irrelevant or invalid: "[T]he fact that an employer is acting under court compulsion may be evidence that the employer is acting in good faith and without discriminatory intent." *Wilks*, supra, ____U.S. at _____, 109 S.Ct. at 2198, 104 L.Ed.2d at _____ (Stevens, J., dissenting.)

III. CONCLUSION

After careful consideration, the Court has concluded that defendant's motion for directed verdict, made at the end of trial, should have been sustained. Per the above discussion the Court has determined that the plaintiff failed to establish a prima facie case of discrimination under 42 U.S.C. Section 1983.

IV. ORDER

IT IS HEREBY ORDERED that judgment shall be entered in favor of the Defendant City of Omaha and against the plaintiff, Thomas J. Donaghy.

DATED this 10th day of April, 1990.

BY THE COURT:

s/Richard E. Robinson
SENIOR JUDGE, UNITED STATES DISTRICT COURT

FILED DISTRICT OF NEBRASKA
APRIL 11, 1990
NORBERT H. EBEL, Clerk

TR p. 12, 7-10:

Q. Can you tell me what happened when you applied for the position of sergeant?

A. I took a series of tests to determine the outcome of rank order on a promotional list.

TR p. 13, 12-18:

A. As a result of the injunction, there was an instruction by the judge who heard the case, that the top seven persons on that promotional list would be promoted as well as the next three black officers irrespective of their placement, and the list would then be cancelled immediately and a new test would be given.

TR p. 15, 3-7:

A. The pro -- the testing began in 1987 and the list was completed in, I

believe, April of 1988, possibly April 7.

Q. And is that the list that we're now -- that's the concern of this lawsuit?

TR p. 85, 3-8:

... Since we've discussed Sergeant Hadley, is Sergeant Hadley one of the three black people that was below rank number 20 that was advanced, to be considered for, or to be invited to the assessment center?

A. Yes, I believe he was.

TR p. 134, 1-25 & p. 135, 1-4.

Q. And for the same reason?

A. Yes.

Q. Okay. Okay. Now, at this point I need to ask you, in the first group was added Number 13, one, two, three, four, five, 13, you said. Was -- and that was Sergeant Hadley. Was he hired as a lieutenant?

A. Yes.

Q. Okay. Then where we now have listed four, five, and six, had Lieutenant Hadley not been put in, we would have number five, six, and seven; is that right?

A. I've gotten lost in that chronology.

Q. In the first group to be referred, there were six people?

A. There were six people, actually --

Q. For three openings?

A. Yes.

Q. They were number one, two, three, four, five, and 13?

A. Correct.

Q. Number 13, the one that was not in rank order, is the one that was hired?

A. As well as two other individuals.

Q. Right. Now, had the one of rank order not been referred, now that we get to the third referral, Sergeant Donaghy would have been referred, would he not? He was number seven?

A. Yes, he would have been referred.

TR p.224, 4-18:

Q. Sergeant Donaghy, you were -- have heard a great deal about a Consent Decree that's involved here, and that Consent Decree, it's indicated, was entered in October of 1980. Were you made a part of that Consent Decree? Were you -- when the Midwest Guardians filed that complaint, were you notified?

A. No, I was not.

Q. Did you participate in that lawsuit in any way?

A. No, I did not.

Q. Did you agree at any point to -- allowing that Consent Decree that is in effect to infringe on your constitutional rights?

A. No, I did not.

Consent Decree p. 4 & 5:

8. It is the purpose and intent of

this Decree to ensure that blacks are not disadvantaged by the hiring, promotion, assignment, and other employment policies and practices of the OPD and that practices and policies, if any, that may have had an adverse effect on blacks in the past are remedied so that equal employment opportunity be provided to all. Subject to the availability of qualified applicants, the City of Omaha will achieve a long term goal of hiring sufficient numbers of black sworn officers onto the OPD to result in an overall workforce consisting of 9.5% black officers within seven years of the entry of this Decree. In order to meet this long term goal, the City adopts the interim goals set out below for use on an annual basis in filling vacancies in sworn OPD positions:

(a) For the sworn entry position of police officer, the interim goal shall be to fill at least forty percent

(40%) of all vacancies with qualified black applicants until such time as black officers constitute six percent (6%) of the overall sworn workforce of the OPD. Thereafter, the interim goal shall be to fill at least one third (33 1/3%) of all vacancies with qualified black applicants until such time as black officers constitute eight percent (8%) of the overall sworn workforce of the OPD. Thereafter, the interim goal shall be to fill at least twenty-five percent (25%) of all vacancies with qualified black applicants until the long term goal is achieved.

It is recognized that the City of Omaha has made substantial efforts to recruit black applicants for the sworn entry level position of police officer. The City shall maintain an active and continuing program of recruitment directed at increasing the number of black

applicants for entry level positions to a level consistent with achieving this interim goal. The City shall solicit the suggestions of the Brotherhood of Midwest Guardians as to the most effective methods and techniques to be utilized in such a recruitment program.

(b) For promotional sworn positions in the OPD, the interim goal shall be to appoint qualified blacks in at least the proportion that these groups are represented in the classes of employees eligible for promotion.

Nothing herein shall be interpreted as requiring the City to hire unnecessary personnel, or to hire, transfer, or promote a person who cannot qualify on the basis of objective job-related criteria, or to hire, transfer or promote a person who is less qualified on the basis of properly validated employment selection devices within the meaning

of the Uniform Guide-lines on Employee Selection Procedures"

TR p.47, 9-21:

Q. Okay. Can you tell me how you determine whether a test is valid for selecting people for promotion; for example, in this position, lieutenant, how do you determine whether a test is valid?

A. Well, according to federal guidelines, there are three methods to determine that a test is valid. Those three methods are called criteria and related validity, construct validity, and content validity. The method that we use in the personnel department for almost all positions, including the promotional positions in the police department, is what is called content validity.

TR p.90, 7-21:

A. Nothing herein shall be

interpreted as requiring the City to hire unnecessary personnel, or to hire, transfer, or promote a person who cannot qualify on the basis of objective job-related job criteria; or to hire, transfer, or promote a person who is less qualified on the basis of properly validated employment selection devices within the meaning of the Uniform Guidelines on employee selection procedures, hereinafter referred to as Uniform Guidelines.

Q. And without getting into a lot of detail about it, you do consider the Uniform Guidelines that are referred to here in your validation of the test results, do you not?

A. Yes, we do.

TR p.68, 20-25:

Q. Okay. Leaving out for the moment the Affirmative Action

consideration, why were the top 15 picked? I understand that you said that's what we did because that's what we did, but I'm asking you how you arrive at the idea that -- that -- number one to 15 instead of number 35, 34, 12.

TR p.69, 10-20:

A. Yes.

Q. Do you know a better way, a more fair way?

A. I personally do not.

Q. Is it your job to provide the most fair way that's possible to promote people or to consider people for promotion?

A. Yes.

Q. So in the process of doing your job, you believe picking rank order one to 15 is the fairest way to get 15 people in?

TR p.72, 9-25; AND TR p.73, 1-5:

Q. And then four other people were selected on the basis -- three on the basis of their race and one on the basis of their sex; is that right?

A. And also their performance on the test.

Q. Okay. In other words, when you went down looking at we need three black persons, you went down in rank order and picked the next three black persons in rank order?

A. That's correct.

Q. You again relied on rank order as the best determiner -- now, I don't want to put words in your mouth, and I want you to tell me if I'm wrong, because we've been kicking rank order around a lot and I want to make sure that I'm not asking you to say something that isn't

right -- you picked them in rank order because that's the best way you know to be fair in picking who the next -- who else is considered; is that right?

A. That's the best method available to determine who goes on to the next step of this selection process.

TR p.85, 25; AND TR p.86, 1-25; AND TR p.87, 1-25:

Q. Okay. Sergeant Hadley then was moved from a position lower than number 20, up to within the top 20 to be invited to the assessment center, and he was -- that was done on one criteria, that is, his skin color; is that right?

A. No.

Q. Why on earth was he moved, then?

A. Well, first of all, he wasn't moved. I mean, his rank did not change. He was invited and he was invited based upon, first of all, his performance on all of those tests that I mentioned, and his rank.

Q. Okay.

A. And secondly, the fact that there was an underutilization of blacks, and the need, based on the Consent Decree, to ensure that blacks were available to be promoted.

Q. Okay.

A. So it was a combination of --

Q. Combin --

A. -- all of those elements. A combination of all those elements.

Q. Now, the test scores are what are used to determine rank order?

A. Yes.

Q. And those are fair criteria and

not related to race or anything, except for qualifications required to do the job; is that right?

A. Those are fair criteria of the measurement of knowledge and ability related to the job, yes.

Q. Okay. Does that translate to qualification to do the job?

A. It is a measurement of qualification.

Q. Okay. So when we determine rank order, we determine the measurement of the person's qualification to do the job?

A. It's one available measurement, yes.

Q. Okay. What other measurement is applied?

A. Well, ultimately, when the Chief of Police or hiring authority in any department makes a decision as to whom to

promote or whom to hire, they would consider, for example, their achievements on the job, their education background, their other accomplishments.

Q. But that doesn't come into play until they see the Chief?

A. That's right, those would be the factors.

Decree p.2:

4. The City of Omaha expressly denies that it is or has been guilty of any wrong-doing. It is understood that this Decree does not in any manner constitute an admission by the Defendants that they have intentionally or knowingly violated any federal law prohibiting discrimination in employment on the basis of race or color.

TR 13, 13-18:

A. As a result of the injunction, there was an instruction by the judge who heard the case, that the top seven persons on that promotional list would be promoted as well as the next three black officers irrespective of their placement, and the list would then be cancelled immediately and a new test would be given.

TR p.121, 1-25, p.122, 1-25:

Q. Can you tell me what the City Code says -- okay. Once you've gotten a list of 20 here and the people were then referred for -- to the assessment center; is that right?

A. Yes.

Q. Okay. What happened at the assessment center?

A. The assessment center was

administered and there was a score that resulted for each of the participants.

Q. Okay. Now, were those people listed again in rank order according to their combined scores?

A. Yes.

Q. Okay. That creates a list; is that right?

A. Yes.

Q. Okay. Now, at that point, what does the City Code require you to do in terms of referring people to the Chief for promotion?

A. Referring three candidates for one vacancy; for more than one vacancy, referring double the number.

Q. And does it describe which candidates you're supposed to refer?

A. Yes.

Q. Okay. And what does it say about --

A. In rank order.

Q. Okay. Now, did you look at the rank order one through six?

A. Yes.

Q. In this list?

A. Yes.

Q. Which would have been the ones required for three openings; is that right?

A. Yes.

Q. And there were three openings, weren't there?

A. Yes.

Q. So you looked at the list of six and what did you find? Well, that's pretty -- let me make that more narrow. What did you find in terms of that -- the charact -- the racial and sex characteristics of the people one through six?

A. That included a Hispanic male, a white female, and four white males.

Q. Okay. Did you refer that list in rank order as the Code called for?

A. One through five were, and then a black candidate ewas substituted for number six.

POLICE LIEUTENANT
EXAMINATION PROCEDURES
1987

102

The Examination will be conducted in three phases.

I. Phase One will consist of a Multiple Choice Examination, which will be based on the bibliography below. All candidates who meet the minimum qualifications will be invited to participate in Phase One. In addition, they will be awarded additional credit for City Service with the Police Division and college achievement.

II. Scores on the Multiple Choice Examination will be combined with City Service and college points. Based on this combined score, thirty-five (35) candidates (plus ties) will be invited to participate in Phase Two of the Examination Process, the In-Basket. The composition of this group will be based on the combined scores (multiple choice, seniority, and college), and will also include some individuals who will be referred based on the City's current Affirmative Action Plan.

III. The In-Basket will be scored and statistically combined with previous (Phase One) scores.

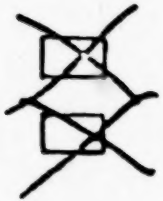
REMINDER REGARDING
ATTACHED CANDIDATES

103

Attached is a P-20 which lists candidates for the vacant position(s) in your department.

A-98

There is an underutilization in the EEO category in which this position is grouped. The underutilization applies to:



Minorities

Females

NOTE: IN ORDER TO COMPLY WITH THE CONSENT DECREE, A BLACK CANDIDATE MUST BE SELECTED.

XIV Amendment of the Constitution of the United States of America

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

XIII Amendment of the Constitution of the United States of America

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

42 U.S.C. s 1981
Equal Rights Under The Law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C s 1983
Civil Action For Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. As amended Pub.L. 96-170, s 1, Dec. 29, 1979, 93 Stat. 1284.

Sec. 23-231. Generally.

All vacancies in the classified service shall be filled by reemployment, promotion, original appointment, transfer or demotion as provided in this chaper. When a vacancy in the classified service is to be filled, other than by transfer or demotion, the department head shall submit a requisition to the personnel director. The requisition shall state the class title, the number of positions to be filled and other appropriate information. In addition, desirable special qualifications for the position under consideration may be indicated and the reasons therefor. Eligibles shall be certified in strict order of standing on the list except in cases where the personnel director has determined there is good reason for certification of eligibles with special qualifications. In the latter case, eligibles meeting these special qualifications shall be certified in the order of their standing on the list.

No. 19728. 7-8-58; Code 1959, s 7.04.530; Ord. No. 27340, s 2, 12-17-74; Ord. No. 27361 s 1 2-4-75)

Sec. 23-232. Certification of eligibles.

Upon receipt of a personnel requisition, the personnel director shall certify in writing the names of available eligibles. If one position is to be filled, the director shall submit the three (3) highest names on the appropriate list, except as provided in section 23-231 of this Code. If more than one position is to be filled in the same department, the director shall submit twice as many eligibles as there are vacancies if there are that number of eligibles on the list. Otherwise the director shall certify the entire list. The following employment lists shall be used by the personnel director in the order indicated: (a) Reemployment lists; (b) promotion lists; (c) merged list of open-continuous and competitive eligibles. If there are not sufficient names on any list or combination of lists

as provided in this rules to certify the number of names specified herein, the personnel director shall require appointment from the available eligibles unless the department head shall give in writing reasons why such eligibles should not be appointed. Within ten (10) days from the date of certification the department shall return the list of names certified indicating which of the eligibles were appointed or the reasons for not filling the vacant position(s). (Ord. No. 14924, s 69-9.2, 5-13-41; Ord. No. 19728, 7-8-58; Code 1959, s 7.04.540; Ord. No. 27340, s 1, 12-17-74)